

### § 359.603

### 5 CFR Ch. I (1–1–04 Edition)

who is still serving a probationary period.

[54 FR 18876, May, 3, 1989, as amended at 60 FR 6388, Feb. 2, 1995]

#### § 359.603 OPM priority placement.

(a) *Agency certification.* (1) If there is no vacant SES position within the agency for which an appointee covered by § 359.602(b) is qualified, the agency head, or the acting agency head in the absence of the agency head, shall certify to OPM in writing that no such position is available. This certification may not be delegated below the Assistant Secretary level in a department, or an equivalent level above the director of personnel in other agencies.

(2) The 45-day period during which OPM will attempt to place the appointee begins on the day the certification is acknowledged by OPM.

(3) It is the continuing responsibility of an agency that has a surplus career appointee to place the appointee in any vacant SES position in the agency for which the appointee is qualified, even after the appointee is certified to OPM.

(4) An individual remains a career SES appointee in his or her agency during the OPM placement period.

(b) *OPM authority.* As provided by § U.S.C. 3595(b)(3), OPM may require an agency to take any action that OPM considers necessary to carry out a placement.

(c) *OPM referrals.* (1) OPM may formally refer a career appointee to an agency for a specific SES vacancy or general priority consideration. Such a referral may not become a part of the regular competitive staffing process. The appointee must be considered by the agency for a noncompetitive SES appointment.

(2) Any objection by the agency to the qualifications of the appointee must be based on the professional/technical qualifications in the standard for the position. An agency may not rely solely on lack of agency-specific experience for an objection based on lack of professional/technical qualifications if the appointee is otherwise qualified.

(d) *Agency response.* (1) In order to expedite placement of surplus career appointees, an agency shall respond to an OPM referral within the time period prescribed by OPM.

(2) If an agency fails to place a referred career appointee in an SES position because of objection to the appointee's qualifications or because of any other reason, the agency response must be in writing and must be signed by the agency head, or the acting agency head in the absence of the agency head. The response may not be delegated below the Assistant Secretary level in a department, or an equivalent level above the director of personnel in other agencies.

(3) If an agency cancels a position while a referral to the position is pending, the appointee will be entitled to priority consideration for the position if it or a successor position is reestablished in the SES within 1 year of the cancellation date and the appointee has not been placed in another SES position.

(e) *Corrective action.* If an agency fails to provide bona fide priority consideration, OPM may order appropriate corrective action.

(f) *Declination by employee.* If a career appointee declines a reasonable offer of placement, OPM's placement efforts will cease. The appointee may be removed from the SES at the expiration of the agency notice period.

[54 FR 18876, May, 3, 1989, as amended at 60 FR 6388, Feb. 2, 1995]

#### § 359.604 Removal from the SES and placement rights outside the SES.

(a) If a probationary appointee is identified for reduction in force under § 359.602(a), removal action is taken under § 359.405. Placement rights outside the SES are covered under subpart G of this part.

(b) If a career appointee who has completed the probationary period, or who did not have to serve one, is identified for reduction in force under § 359.602(a) and is not placed elsewhere in the SES under § 359.602(b) or § 359.603, or declines a placement offer under § 359.603, removal action is taken under § 359.604(b). Placement rights outside the SES are covered under subpart G of this part.

#### § 359.605 Notice requirements.

(a) Each career appointee subject to removal under § 359.604(b) is entitled to a specific, written notice at least 45

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calendar days before the effective date of the removal. The notice shall state, as a minimum—

(1) The action to be taken and its prospective effective date;

(2) The nature of the competition, including the appointee's competitive area, if less than the agency, and standing on the retention register;

(3) The place where the appointee may inspect the regulations and records pertinent to the action;

(4) Placement rights within the agency and through OPM, including how the employee can apply for OPM placement assistance; and

(5) The appointee's appeal rights, including the time limit for appeal and the location of the Merit Systems Protection Board office to which an appeal should be sent.

(b) A career appointee who has received a notice under paragraph (a) of this section is entitled to a second notice in writing at least 1 day before removal from the SES. The notice shall state, as a minimum—

(1) The basis for the removal, i.e., 5 U.S.C. 3595(b)(5) if the basis is expiration of the 45-day OPM placement period, or 5 U.S.C. 3595(b)(4) if the basis is declination of a reasonable offer of placement, in which case identify the position offered and the date on which it was declined;

(2) The effective date of the removal;

(3) Placement rights outside the SES and, when applicable, the appointee's eligibility for discontinued service retirement in lieu of placement; and

(4) Reminder of the appointee's appeal rights.

[60 FR 6389, Feb. 2, 1995]

### § 359.606 Appeals.

A career appointee may appeal to the Merit Systems Protection Board whether the reduction in force complies with the competitive procedures in § 359.602(a).

### § 359.607 Records.

Each agency shall maintain current records needed to determine the retention standing of its competing appointees. The agency shall allow the inspection of its retention registers and related records by an appointee to the extent that they have a bearing on

the appointee's situation. The agency shall preserve intact all registers and records relating to a reduction-in-force action for at least 2 years from the effective date of the action.

### § 359.608 Transfer of function.

(a) *Transfer of function* means the transfer of the performance of a continuing function from one agency to one or more other agencies.

(b) A career appointee is entitled to accompany his or her function to the new agency without any change in tenure if the alternative is removal from the SES in the current agency under reduction in force.

## Subpart G—Guaranteed Placement

### § 359.701 Coverage.

This subpart covers career appointees, other than reemployed annuitants, who are removed from the SES under any of the following conditions:

(a) Removal during the probationary period under subpart C of this part or under subpart D of this part for other than misconduct, neglect of duty, malfeasance, or other disciplinary reasons under § 359.403, § 359.404, or part 752, subpart F, of this chapter, if at the time of appointment to the SES the individual held a career or career-conditional appointment or an appointment of equivalent tenure, as determined by OPM. An appointment of equivalent tenure is considered to be an appointment in the excepted service other than an appointment—

(1) To a Schedule C position established under part 213 of this chapter;

(2) To a position that meets the same criteria as a Schedule C position; or

(3) To a position where the incumbent is traditionally changed upon a change in Presidential Administrations.

(b) Removal as the result of:

(1) Failure to be recertified under subpart C of this part;

(2) Less than fully successful executive performance under subpart E of this part; or

(3) A reduction in force under subpart F of this part. The appointee must have completed the required probationary period under the SES or was